FOR ARGUMENT

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Nos. 74-1608 and 74-1619

In the Supreme Court of the United States

October Term, 1975

The National Association for the Advancement of Colored People, et al., petitioners

v.

Federal Power Commission

Federal Power Commission, petitioner

v.

The National Association for the Advancement of Colored People, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

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1. The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision in this case, which involves the authority of the Federal Power Commission to proscribe, or to take ac-

count of, discriminatory employment practices by persons subject to its regulatory jurisdiction, may affect the *amici*'s enforcement responsibilities.

2. We adhere to the view, expressed in our memorandum at the petition stage, that the questions presented in this case were decided correctly by the court of appeals. That court held that Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (FPC Pet. App. 24a-25a). But the court also held that the Commission's statutory responsibility to ensure "that no unnecessary or illegitimate costs are passed along to [the] consumer" carries with it the limited authority to take into account, in the discharge of its usual regulatory functions, the "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination" (*id.* at 25a).

Emphasizing that "[t]he line is always to be drawn between regulation reasonably related to the Commission's central functions," which is permitted, "and regulation of employment discrimination for its own sake," which is prohibited (*id.* at 27a), the court of appeals properly left for the Commission to determine in the first instance on remand the manner in which to approach the problem as part of its normal regulatory functions (*id.* at 26a). The court correctly accorded the Commission latitude in determining what kinds of costs it may meaningfully consider in various regulatory contexts (see *id.* at 25a-26a), how and when to quantify those costs (see *id.* at 26a-27a), and whether to proceed by rulemaking or on a case-by-case basis (see *id.* at 26a-27a, 33a, n. 53).[1]

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[1]The Federal Home Loan Bank Board and the Federal Communications Commission have promulgated regulations governing the equal employment practices of companies subject to their regulatory juris-

3. The disagreement between the parties appears to have narrowed since the petitions for a writ of certiorari were filed. The Commission concedes that it has authority, in the exercise of its rate review functions, to disallow as unjust and unreasonable at least some quantifiable costs attributable to discriminatory employment practices (Br. 8, 12 20, 25, 26). The NAACP apparently has abandoned its contention that the Commission must affirmatively regulate the equal employment practices of the companies subject to its jurisdiction (see Cross-Pet. 9-14); it now argues only that the Commission should be free on remand to consider all appropriate methods of exercising its more limited authority and should be required to issue a rule announcing what its basic policy will be with respect to employment discrimination (Br. 15).

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diction. See 12 C.F.R. 528.7; 47 C.F.R. 21.307, 76.311. The Interstate Commerce Commission and the Civil Aeronautics Board are considering whether to issue rules with respect to the equal employment practices of regulated companies. See 36 Fed. Reg. 10741; 37 Fed. Reg. 15518.

The Securities and Exchange Commission declined to promulgate rules governing equal employment opportunity in the securities industry, in part because it was unable to conclude that broker-dealers' employment practices have any significant relationship to investor protection or fair dealing in securities. Securities Exchange Act Release No. 10597 (January 14, 1974), 39 Fed. Reg. 2809; Securities Exchange Act Release No. 11189 (January 20, 1975). The Commission also declined to require corporations to disclose statistical data describing the racial, sexual, and ethnic composition of their work forces. Securities Act Release No. 5627 (October 14, 1975), 40 Fed. Reg. 51656. It issued a release, however, calling to the attention of corporate registrants the obligation, under the Commission's existing rules, to disclose any pending civil rights litigation that could have a material effect on a registrant's assets. Securities Act Release No. 5170 (July 19, 1971), 36 Fed. Reg. 13989.

The scope of each agency's authority to regulate in this area depends upon the nature of its statutory responsibility. None of the agency determinations or proposals mentioned in this footnote has yet been subject to judicial review.

The principal difference between the parties concerns the scope, not the existence, of the Commission's authority to consider employment discrimination. The dispute is over where "[t]he line is * * * to be drawn between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake" (FPC Pet. App. 27a). The Commission argues that to do anything more than disallow adjudicated back pay awards would, as a practical matter, require it "to regulate employment practices" (Br. 9). The NAACP argues that the Commission could properly implement its authority by adopting far-reaching regulatory programs (see Br. 20-34).

In our view, these abstract differences need not be resolved at the present stage of this litigation. If, as the court of appeals held, the Commission has authority to take account of the equal employment practices of the companies within its jurisdiction to the extent that those practices bear upon the Commission's usual regulatory functions, the application of that standard to the various situations hypothesized by the parties should be left in the first instance to the Commission. It should also be for the Commission to decide initially whether the issues are to be dealt with through rulemaking or by adjudication in individual cases.

We therefore respectfully submit that the judgment of the court of appeals should be affirmed.

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FEBRUARY 1976.